MICHIGAN SUPREME COURT

Office of Public Information

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SEXUAL HARASSMENT, REVERSE DISCRIMINATION SUITS AMONG CASES TO BE HEARD BY MICHIGAN SUPREME COURT

LANSING, MI, December 8, 2003 –A challenge to a $21 million verdict on a sexual harassment claim will come before the Michigan Supreme Court this week for oral argument.

In *Gilbert v. DaimlerChrysler*, the plaintiff claimed she was subjected to abusive comments and conduct many times over a period of years. DaimlerChrysler seeks to overturn the verdict a jury returned for the plaintiff, arguing in part that it did everything it could to address the plaintiff's complaints of sexual harassment.

Also before the Court is *Lind v. City of Battle Creek*. The plaintiff, a white police officer, claims the City of Battle Creek discriminated against him on the basis of race by promoting an African-American officer to police sergeant, a position for which the plaintiff also applied.

The Court will also hear *Castle Investment Company v. City of Detroit*, in which an investment company challenges a 1976 City of Detroit ordinance that requires home inspections for one- and two-family homes when they are sold. The company asserts that the ordinance is unconstitutional because the Detroit city council never approved guidelines for the inspections.

The Court will hear nine other cases, involving liens, insurance, negligence, medical malpractice, constitutional law, legal procedure, and charges for public records.

Court will be held **December 9, 10, and 11.** Court will convene at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and might not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. For further details about these cases, please contact the attorneys. Briefs in these cases may be viewed on the Michigan Supreme Court's website at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm.)

Tuesday, December 9
Morning session

MONAT v. STATE FARM INSURANCE COMPANY (case no. 121122)
Attorney for plaintiff Frank Monat: Jeffrey Hollander/248.669.7151
Attorney for defendant State Farm Insurance Company: Richard E. Moblo/248.305.9900
Trial court/judge: Wayne County Circuit Court/Hon. Michael J. Callahan

At issue: The defendant insurance company unsuccessfully sought dismissal of the plaintiff's suit for personal protection insurance benefits. The insurance company argued that a jury in a separate lawsuit found that the plaintiff was not injured in the accident for which he claimed benefits. The insurance company was not a party to that lawsuit. Is the plaintiff barred from suing the insurance company?
Background: Frank Monat was in an auto accident with Loni Mrozek, whose vehicle rear-ended the one Monat was driving. Monat claimed serious personal injuries from the accident. He had a no-fault insurance policy through State Farm Insurance Company, which initially paid him personal protection insurance benefits. State Farm stopped paying benefits after Monat sued Mrozek; Monat then brought a separate lawsuit against State Farm. In Monat's case against Mrozek, the jury found in favor of Mrozek and concluded that Monat was not injured. State Farm then moved to dismiss Monat's claims against it. State Farm argued that, in light of the jury's conclusion in the Mrozek case, Monat should be barred from arguing that he was injured in the accident. It came to light that the parties in the Mrozek case had entered into an agreement setting a range of damages before the case went to the jury. Part of the agreement was that there would be no appeal. Monat argued that the Mrozek case was not fully litigated because Monat had no chance to appeal the decision. He also argued that the result in the Mrozek case should not bar his separate claim against his insurer. The trial judge denied State Farm's motion; the Court of Appeals affirmed the trial court's ruling in an unpublished per curiam opinion. State Farm appeals.

CASTLE INVESTMENT COMPANY v. CITY OF DETROIT (case no. 121598)
Attorney for plaintiff Castle Investment Company: Veleta Brooks-Burkett/313.259.3197
Attorney for defendant City of Detroit: Linda D. Fegins/313.237.3022
Trial court/judge: Wayne County Circuit Court/Hon. Susan Bieke Neilson
At issue: The plaintiff investment company sought to challenge a City of Detroit ordinance that requires home inspections for one- and two-family homes when they are sold. The company asserted that the ordinance is unconstitutional because the Detroit city council never approved guidelines for the inspections. Did the trial court err in dismissing the company's lawsuit?
Background: On October 21, 1974, the Detroit city council declared an emergency and enacted an emergency ordinance, 9-H, that required a certificate of approval from the city's Buildings and Safety Engineering Department (BSED) for the sale of one- and two-family homes. The emergency ordinance provided in part that there were a "substantial number of substandard dwellings . . . sold in the City of Detroit, often by fraudulent means, by private real estate investors and speculators; many of these dwellings . . . do not meet even minimum standards of habitability and liveability . . . ." Ordinance 9-H also directed the BSED to promulgate rules and regulations for the home inspections, which the department provided and which were placed on file and made available to the public. The ordinance amended Chapter 12 of the Code of the City of Detroit by adding a new Article VII: "Emergency Restrictions on Sales or Conveyances of One (1) and Two (2) Family Dwellings by Governmental Agencies and Private Real Estate Investors." Section 12-7-3 provided in part that: "The rules and regulations and application for inspection shall be obtainable at the [BSED] and at other specified locations." A second version of the ordinance also directed the BSED to make inspection information and applications available to the public. In 1976, the Detroit City Council passed Ordinance 124-H, which provided in part that "The [BSED] shall prepare a list of inspection guidelines to be used in inspection relating to the enforcement of this article …. The inspection guidelines shall be issued

to the applicant for certificate of approval or inspection report and made available free of charge to the general public. The city shall notify the general public, as the city council shall recommend by resolution that the guidelines exist and are available." The ordinance further provides that "The guidelines shall not be effective until approved by city council." The ordinance and a copy of the "recommended Rules and Regulations to be used in inspections relating to the implementation of the subject Ordinance" were published in the council minutes. The minutes indicated that the rules and regulations had been "[r]eceived and placed on file."

During the 1980's, the ordinance's constitutionality was challenged in several lawsuits, including one suit brought by Castle Investment Company, but the ordinance was upheld each time. Castle Investment Company filed this lawsuit in 1998 as a class action against the City of Detroit. Castle Investment moved for summary disposition, arguing in part that the council's action of "receiving and placing on file" did not comply with the ordinance's requirement that the guidelines "shall not be effective until approved by city council." Without the council's approval, the ordinance was unconstitutional because the BSED was usurping the City Council's law-making function, Castle Investment claimed. The City of Detroit moved to dismiss the suit on the basis of the legal doctrine of laches, asserting that Castle Investment failed to challenge the ordinance within a reasonable time after it was enacted. The procedural flaw was an insufficient basis for overturning an ordinance that has been relied on by the city and public for such an extended period of time, the city added. The city further argued that the remaining portions of the ordinance were valid and that the ordinance did not violate any provision of the Michigan or United States Constitution. The city also contended that Castle Investment was barred from challenging the ordinance under the legal doctrine of collateral estoppel because the company had unsuccessfully challenged the same ordinance in an earlier case. Wayne County Circuit Court Judge Dalton A. Robertson ruled in favor of the city, stating that he dismissed the case "based on laches and collateral estoppel." Castle Investment's motion for reconsideration was denied by Circuit Judge Susan Bieke Neilson. In an unpublished per curiam opinion, the Court of Appeals affirmed the trial court's dismissal of the case on the basis of laches. The Court of Appeals also held that the trial court erred by barring Castle Investment's claim on the basis of collateral estoppel because the same issue was not litigated in any of the earlier cases. The error was harmless, however, the Court of Appeals said. Castle Investment appeals.

LIND v. CITY OF BATTLE CREEK (case no. 122054)
Attorney for plaintiff Michael Lind: Marshall W. Grate/616.285.8899
Attorneys for defendant City of Battle Creek: Clyde J. Robinson, Barbara A. Hobson/616.966.3385
Trial court/judge: Calhoun County Circuit Court/Hon. Allen L. Garbrecht
At issue: The plaintiff is a white police officer who alleges "reverse discrimination" in the city's decision to promote an African-American to police sergeant. The trial court dismissed his lawsuit, stating that the officer had failed to present sufficient evidence of background circumstances to support a suspicion that the city was the unusual employer who discriminates against the majority. What evidence is the plaintiff required to show to maintain his claim?
Background: Michael Lind is a white Battle Creek police officer who sought a promotion to sergeant. Pursuant to a collective bargaining agreement, candidates are ranked and if a sergeant position vacancy occurs, the City may select any of the top five candidates. In 1996, when Lind sought the promotion, there had recently been three promotions to sergeant. After those promotions, Lind was ranked second on the list, while African-American police officer Arthur

McClenney was fifth among the eligible candidates. McClenney was promoted to sergeant. Lind sued, alleging reverse discrimination. He asserted that his qualifications were superior to McClenney's and that McClenney's promotion violated the police department's past practice. Lind also claimed that an African-American woman's previous promotion to an administrative aide position, coupled with comments by a deputy police chief, constituted evidence of reverse discrimination. The City of Battle Creek moved to dismiss the case, contending that Lind had failed to make a prima facie case of reverse discrimination. The city presented evidence that McClenney was promoted because he possessed greater maturity and better judgment. Lind had not refuted that evidence or demonstrated that the city acted with a discriminatory motive, the city argued. The trial judge agreed and dismissed Lind's reverse discrimination claim. The judge ruled that Lind did not present sufficient evidence of background circumstances to support a suspicion that the city was the unusual employer who discriminates against the majority. He also held that, even if Lind did establish a prima facie case of reverse discrimination, there was insufficient evidence presented to show that the city's nondiscriminatory explanation was a pretext. The Court of Appeals affirmed in an unpublished per curiam decision. Lind appeals.

Afternoon session

CENTRAL CEILING & PARTITION, INC. v. DEPARTMENT OF COMMERCE (case no. 121009)
Attorney for plaintiff Central Ceiling & Partition, Inc.: Randy G. Martinuzzi/248.437.1030
Attorney for defendant Department of Commerce: Kelley T. McLean/313.456.0040
Attorney for defendant Kitchen Suppliers, Inc.: Roy C. Sgroi/248.645.2440
Attorney for intervening plaintiff Cappy Heating and Air Conditioning, Inc.: Simcha Shapiro/248.353.3810
Attorneys for amicus curiae Michigan Land Title Association: John G. Cameron, Jr., Allison J. Mulder/616.752.2000
Trial court/judge: Wayne County Circuit Court/Hon. Paul S. Teranes
At issue: The plaintiffs in this suit are subcontractors who were not paid for work that they performed on homes built by the general contractor. The plaintiffs timely *filed* liens that the recorder of deeds failed to *record* in timely fashion. The statute says they must be *recorded* timely. Do plaintiffs lose?
Background: Primeau Homes, Inc., was a licensed residential builder engaged in the building construction business in Wayne and Oakland Counties. Primeau contracted with Central Ceiling and Partition, Inc. (Central), Cappy Heating and Air Conditioning, Inc. (Cappy), and Kitchen Suppliers, Inc. (KSI) to provide labor and materials for various home improvement projects. Although the homeowners each paid Primeau Homes for the improvements, Primeau failed to pay its subcontractors for the labor and materials they supplied. Consequently, KSI, Cappy, and Central presented claims of lien for recording to the Wayne County Register of Deeds. The Construction Lien Act provides that the right to an otherwise valid lien "shall cease to exist" [MCL 570.1111(1)] unless the lien is recorded within 90 days of the last date of furnishing of materials. Although the subcontractors' liens were presented for filing within the 90-day period, they remained unrecorded -- i.e., were not assigned a liber and page number noting the date and hour of recording -- until well after the 90 days had expired. Each subcontractor sued to foreclose the liens within one year of the liens' recording and sought to recover from the Homeowner Construction Lien Recovery Fund, which is administered by the Department of

Commerce. The Department of Commerce moved to dismiss the case, arguing that the liens were untimely pursuant to MCL 570.1111(1). The trial court denied the motion, finding that the Homeowner Construction Lien Recovery Fund was subrogated to the rights of the three subcontractors against Primeau Homes in the aggregate amount of $32,249 plus interest, costs and fees. In a published opinion, a majority of the Court of Appeals affirmed. In an opinion authored by Judge Janet T. Neff and joined by Judge Jessica R. Cooper, the majority noted that the Construction Lien Act contained a substantial compliance provision, MCL 570.1302(1), which provides: "The act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them." The majority found that the subcontractors' actions constituted substantial compliance with the Act's requirement that a claim of lien be recorded within ninety days. The majority reasoned that "Attributing the delays within the register of deeds office to the subcontractors, as suggested by defendant, would lead to absurd and unfair results." Judge Kurtis T. Wilder dissented, stating that the majority's opinion defeats the purpose of the requirement that the lien be recorded within 90 days and is inconsistent with the plain meaning of the term "recorded." The Department of Commerce appeals.

IN RE ESTATE OF EUGENE T. CAPUZZI, M.D., DECEASED (case no. 121106)
Attorney for plaintiffs Michael Capuzzi and Eugene T. Capuzzi, Jr: Daniel Martin/231.627.7634
Attorney for defendant Christina Fisher: William J. Lamping/248.642.1920
Trial court/judge: Cheboygan County Probate Court/Hon. Joseph Kwiatkowski
At issue: The power of attorney (POA) that decedent gave his son authorized a transfer of decedent's stock in a limited partnership to his sons only. This transfer would also disinherit the decedent's daughter, because the stock would have otherwise passed under decedent's will to each of his three children in equal shares. Although the agent-son requested the transfer three days before the decedent's death, the partnership refused to honor the request because death terminated the POA before the transfer could be completed. Does the fact that the agent completed the request and only the partnership had to fulfill the request by transferring the stock make the rule that the principal's death terminates the agency inapplicable?
Background: Dr. Eugene T. Capuzzi owned five shares of stock in a joint venture/limited partnership known as the John J. Carlo Limited Partnership. Capuzzi and his wife Mary Grace Capuzzi had three children: Eugene T. Capuzzi, Jr., Michael A. Capuzzi and Christina Fisher. Under the terms of Capuzzi's will and trust, all three children were to benefit equally. Michael Capuzzi, an attorney, was appointed in 1996 as his father's agent and attorney in fact. The Power of Attorney (POA) was revokable and authorized the agent to "sell, assign, transfer and deliver any stocks, bonds or other securities of any kind," in addition to several other enumerated powers. A few days before his death on August 14, 1998, Capuzzi directed Michael to transfer the limited partnership shares to himself and Eugene. In an affidavit, Mary Grace Capuzzi stated that she was present when her husband gave those instructions to Michael. Mary Grace Capuzzi also stated that Christina Fisher had, for a number of years, been estranged from her father and had refused to visit her father even though he was seriously ill. The affidavit further stated that Capuzzi died not wanting his daughter to receive the joint venture shares and that he also wanted to divest himself of all remaining assets to avoid probate. In a letter dated August 10, 1998,

Michael wrote to the limited partnership stating that, pursuant to his father's wishes and the POA, ownership of all remaining five shares were to be distributed equally between him and Eugene. In a letter dated August 19, the limited partnership advised Michael that Capuzzi had died before the shares could be transferred. The limited partnership took the position that the death had revoked the POA, and that, therefore, the transfer could not be completed. When the estate went to probate, Michael and Eugene filed suit, objecting to the shares passing under the will. The trial judge granted their motion for summary disposition, stating in part that the acts of the agent were completed before Capuzzi's death and that the transfer only depended on the limited partnership. The Court of Appeals reversed in an unpublished per curiam opinion, holding that the transfer of the shares couldn't be completed because the decedent's death immediately revoked the POA. The plaintiffs appeal.

Wednesday, December 10
Morning session

TITLE OFFICE, INC. v. VAN BUREN COUNTY TREASURER (case nos. 121077-8)
Attorney for plaintiff Title Office, Inc.: Daniel R. Gravelyn/616.752.2000
Attorney for defendant Van Buren County Treasurer: Thomas King/616.324.3000
Attorney for defendants Allegan County Treasurer, Branch County Treasurer, Hillsdale County Treasurer, Ionia County Treasurer, Jackson County Treasurer, Kalamazoo County Treasurer, and Livingston County Treasurer: Bonnie G. Toskey/517.372.9000
Attorney for amicus curiae Michigan Association of Realtors: Gregory L. McClelland, Marc D. Matlock/517.482.4890
Attorneys for amicus curiae Michigan Association of County Treasurers: Sandra M. Cotter, Daniel J. Oginsky, Julie A. Karkosak/517.374.9100
Trial court/judge: Livingston County Circuit Court/Hon. Stanley J. Latreille
At issue: Should the fee for electronic copies of certain property tax records be computed under the Freedom of Information Act, MCL 15.234, or under the Transcripts and Abstracts of Records Act, MCL 48.101? This appeal involves one of a number of actions filed in circuit courts around the state raising the same legal issue.
Background: The Title Office, Inc., has requested certain tax records from most or all of the county treasurers throughout the state. The request was for "an electronic copy of the tapes or files that contain 1995, 1996, and 1997 property tax records" of the relevant county. Title Office indicated its preference for a certain computer format and offered to provide different types of diskettes to receive the information. The treasurers were willing to provide the information, but wanted to charge Title Office under the Transcripts and Abstracts of Records Act (TARA). TARA provides that "[a]county treasurer shall make upon request a transcript of any paper or record on file in the treasurer's office"; the statute also sets a schedule of fees. For example, for an abstract of taxes on any description of land, the charge is 25 cents for each year covered by the abstract. Title Office argued that the charges should be governed by the Freedom of Information Act (FOIA), which would result in Title Office having to pay substantially less to the county treasurers than if charges were calculated under TARA; the largest fee claimed by a county treasurer is approximately $66,000, while Title Office contends that fee should be about $450. A provision in FOIA, MCL 15.234, requires payment of minimal fees for records produced under the statute. The county treasurers contend in part that FOIA does not apply because MCL 15.234 indicates that it does not apply "to public records prepared under any act or

statute specifically authorizing the sale of those public records to the public" or "if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute." The trial judge granted summary disposition in favor of Title Office and the Court of Appeals affirmed in a published opinion. The county treasurers appeal.

FULTZ v. UNION-COMMERCE ASSOCIATES ET AL. (case no. 121613)
Attorney for Sandra Gail Fultz and Otto Fultz: Brian P. Gijsbers/248.643.6500
Attorney for defendant Creative Maintenance, Ltd.: Noreen L. Slank, J. Mark Cooney/248.355.4141
Trial court/judge: Oakland County Circuit Court/Hon. Fred M. Mester
At issue: Under Michigan law, a property owner does not have a duty to protect or warn those who come on the property against "open and obvious" defects or dangers. Should the doctrine also apply to someone who is not a property owner – in this case, a snow removal contractor?
Background: Sandra Gail Fultz, an employee of Farmer Jack, slipped and fell in the store's icy parking lot on the way to her car after work. She sued the parking lot owner and the maintenance company, Creative Maintenance, which had contracted to plow and salt the parking lot. A jury determined that Creative Maintenance was negligent and awarded damages to Fultz. Creative Maintenance moved to set aside the verdict on the basis of the "open and obvious" doctrine. The danger from the icy parking lot was "open and obvious," Creative Maintenance argued, so Fultz should have observed the ice and protected herself. The trial judge denied the motion, finding that it was for the jury to determine whether the icy parking lot was a condition open and obvious to Fultz. The Court of Appeals affirmed in an unpublished per curiam opinion. Creative Maintenance appeals.

Afternoon session*
** Because one of the cases originally scheduled for the morning session was dismissed by stipulation of the parties in that case, it is possible that the following case may be called earlier than originally scheduled.*
GILBERT v. DAIMLERCHRYSLER CORPORATION (case no. 122457)
Attorney for plaintiff Linda M. Gilbert: Mark R. Bendure/313.961.1525
Attorney for DaimlerChrysler Corporation: Elizabeth P. Hardy/248.645.0000
Attorney for amicus curiae Chamber of Commerce of the United States: Barbara L. Johnson/202.508.9500
Attorney for amicus curiae Michigan Chamber of Commerce: Robert S. LaBrant/517.371.2100
Attorney for amicus curiae Michigan Municipal League Liability & Property Pool: Mary Massaron Ross/313.965.4801
Trial court/judge: Wayne County Circuit Court/Hon. John A. Murphy
At issue: A jury awarded $21 million to the plaintiff to compensate her for what she described as daily gender-based mistreatment by her employer. DaimlerChrysler seeks to overturn the verdict. Among the issues are the amount of damages, the arguments of the plaintiff's attorney, the admissibility of an expert's testimony, and whether the plaintiff presented sufficient evidence of sexual harassment.
Background: Linda M. Gilbert sued her employer, DaimlerChrysler; her contention is that she was continuously subjected to abusive comments and conduct, creating a hostile work environment, from 1992 until the trial of her case in 1999. She did not claim any unwanted

physical contact or that she was forced to leave her job; she remained an employee of DaimlerChrysler after her trial. Following a seven-week trial, a jury awarded Gilbert $21 million for sex discrimination. DaimlerChrysler unsuccessfully challenged the verdict at the trial level and in the Court of Appeals. DaimlerChrysler appeals. Among other issues, DaimlerChrysler contends that the damage award is excessive and punitive in nature and has no relationship to any damage Gilbert might have suffered. DaimlerChrysler also argues that Gilbert's trial attorney inflamed the jury by repeated references to the Holocaust and defendant's German ownership, distorted the evidence, and misstated the law. Third, DaimlerChrysler claims that the trial court erred by permitting Gilbert's counsel to elicit medical opinions from a social worker who testified as an expert witness. Finally, DaimlerChrysler argues that the evidence did not show that it knew or should have known of the sexual harassment Gilbert claims. Whenever DaimlerChrysler received a complaint from Gilbert, the company took prompt remedial action, DaimlerChrysler claims. Gilbert responds in part that the damage award was justified by the evidence and that state law does not impose a maximum award for sexual harassment suits. Gilbert also maintains that her counsel's closing argument and questions were within the bounds of fair adversarial argument and that DaimlerChrysler's counsel only objected once during closing argument. She argues that the trial court acted reasonably in allowing the social worker to testify as an expert because his licensure and expertise allowed him to make psychiatric diagnoses. Gilbert also contends that DaimlerChrysler is directly responsible for the sexual abuse; she claims that supervisors were involved in the abuse. As a result, and because the abuse was so pervasive, DaimlerChrysler should have known about it, Gilbert argues.

WALTZ v. WYSE (case no. 122580)
Attorney for plaintiff Collene E. Waltz, Personal Representative of the Estate of Jerrith Waltz, Deceased: Donald W. Ferris, Jr./734.677.2020
Attorney for defendants Carol Wyse, D.O., and Hills & Dales Community General Hospital: Brett J. Bean/517.333.0306
Trial court/judge: Tuscola County Circuit Court/Hon. Patrick Reed Joslyn
At issue: A woman filed a wrongful death medical malpractice complaint against a doctor and hospital for the death of her four-month-old infant. Did the trial judge err by dismissing her complaint as untimely?
Background: Collene E. Waltz brought a wrongful death medical malpractice action against Dr. Carol Wyse and Hills & Dales Community General Hospital for the death of Waltz's four-month-old son on April 18, 1994. On January 16 and 19, 1999, the hospital and doctor, respectively, received Waltz's notices of intent to sue. Under Michigan law (MCL 600.6912b), a plaintiff in a medical malpractice case is required to give 182 days' notice of intent to sue before filing the actual complaint. The notices of intent were signed by Waltz's attorney as "Attorneys for Plaintiff/Claimant." On May 27, 1999, Waltz petitioned the court and was appointed personal representative of the child's estate. She filed her complaint on June 23, 1999. But the trial judge dismissed her case, stating that, under the statute of limitations for wrongful death actions, Waltz was required to file her complaint on or before April 18, 1999. MCL 600.5852 provides that a wrongful death action "shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run." MCL 600.5805 states that: "Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." Accordingly, Waltz had five years from the time of her son's death to bring suit, the trial judge said. The fact that Waltz filed the notices of intent in

January 1999 did not toll the statute of limitations, the judge ruled. In order to file the notice, Waltz had to be appointed personal representative of the estate, which did not happen until after the statute of limitations expired, the judge concluded. The Court of Appeals affirmed the trial court's ruling in an unpublished per curiam opinion. Waltz appeals. She cites MCL 600.5856(d), which provides that the statutes of limitations or repose are tolled during the 182-day presuit notice period required by MCL 600.6912b. Accordingly, the January 1999 presuit notices stopped the statute of limitations from running out, Waltz contends. She also argues that the trial court erred in ruling that she had to be appointed personal representative in order to file the notice, when the notice of intent statute has no such requirement. She also argues that her appointment as personal representative relates back to service of the notices of intent in January 1999. The defendants respond in part that Waltz was not appointed personal representative of the estate until the three-year grace period for wrongful death actions and the two-year statute of limitations for medical malpractice had both expired. Moreover, MCL 600.5856 does not provide for tolling statutes of limitations, the defendants argue.

Thursday, December 11
Morning session only

VALCANIANT v. DETROIT EDISON COMPANY, et al. (case no. 121141)
Attorneys for Steven J. Valcaniant and Kathleen A. Valcaniant: Michael J. Nolan, William M. Ogden/810.678.3645
Attorney for Detroit Edison Company: John P. Jacobs/313.965.1900
Trial court/judge: Lapeer County Circuit Court/ Hon. Nick O. Holowka
At issue: The plaintiff suffered electrical burns when a dump truck whose movements he was directing severed an overhead power line. The current flow stopped automatically when the line was severed, but an "automatic reclosure device" inflicted three additional brief shocks that caused second-degree burns. Did the defendant utility owe a duty to the plaintiff?
Background: Steven Valcaniant owns a business in Imlay City; the business and its neighbors purchase their electricity from Detroit Edison Company. Each business received its electricity from an uninsulated line 26 feet above the ground. In 1995, the highway in front of Valcaniant's business underwent major reconstruction. He arranged for one of the road project contractors to haul some of the excess dirt from that project onto his own property. At one point, Valcaniant directed a truck to the spot where he wanted a load of dirt dumped. As the truck dumped the dirt, the elevated truck bed hit and severed the power line. Valcaniant received a shock from the current and collapsed. A device called an "automatic reclosure" located nearby stopped the flow of electricity momentarily and restarted the current three times. As a result, Valcaniant suffered second-degree burns to his back and left arm. He and his wife sued the road contractor and later added Detroit Edison as a defendant. Detroit Edison moved to dismiss the case, arguing that it owed no duty to Valcaniant because the accident was not foreseeable. Valcaniant argued that his major injuries resulted, not from the initial accidental contact with the line, but because the automatic reclosure device restarted the flow of current three times after the severed line fell to the ground. He contended that Detroit Edison was negligent because it was foreseeable that the automatic reclosure device would injure someone close to a downed wire. The trial judge denied Detroit Edison's motion. In an unpublished per curiam opinion, the Court of Appeals reversed, stating that the case should be dismissed "Because plaintiff's injury was not reasonably foreseeable, defendant owed plaintiff no duty to prevent it." Valcaniant appeals.

ROBERTS v. MECOSTA COUNTY GENERAL HOSPITAL (case nos. 122312, 122335, 122338)
Attorneys for plaintiff Lisa Roberts: Mark Granzotto/248.546.4649, Angela J. Nicita/313.388.6966
Attorney for defendant Mecosta County General Hospital: Jon D. Vander Ploeg/616.774.8000
Attorney for defendant Michael Atkins, M.D.: Mark A. Burnheimer/231.946.6200
Attorney for defendants Gail A. Desnoyers, M.D., Barb Davis, and Obstetrics and Gynecology of Big Rapids, P.C., f/k/a Gunther, Desnoyers & Mekaru: Kerr L. Moyer/616. 949.7963
Trial court/judge: Mecosta County Circuit Court/Hon. Lawrence C. Root
At issue: Under Michigan's medical malpractice law, the plaintiff was required to file a presuit notice describing how the defendants breached the standard of medical care and how their actions caused her harm. Did the plaintiff's notice of intent give sufficient detail about the standard of care, the defendants' breaches of that standard, and causation to satisfy the statutory requirements? The defendants argue that the presuit notice was inadequate and that the plaintiff's suit should be dismissed.
Background: Lisa Roberts was pregnant with her first child when she went to Mecosta County General Hospital on October 4, 1994, complaining of severe pain. She was seen by Dr. Gail Desnoyers, an obstetrician, and Barb Davis, a physician's assistant. They diagnosed that she had suffered a spontaneous abortion. A D&C was performed and Roberts was sent home. She visited the hospital a second time on October 7, 1994, and was treated by emergency room physician Dr. Michael Atkins. Ultimately, doctors discovered that Roberts had been suffering from an ectopic pregnancy, not a spontaneous abortion, and that her left fallopian tube had burst. The left fallopian tube was removed during emergency surgery, leaving Roberts unable to have children, because her right fallopian tube had been removed some years earlier.

Roberts sued the hospital, Atkins, Desnoyers and Davis for malpractice in Mecosta County Circuit Court. Six months before filing suit, as required under Michigan law (MCL 600.2912b), Roberts sent a presuit notice to each defendant. In the presuit notice, Roberts described her treatment. She also stated the defendants had a duty to "render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standards of care." She further stated that the defendants "failed to provide her with the applicable standard of practice and care." After the lawsuit started and the statute of limitations had run out, the defendants moved to dismiss the case, arguing that the notice was incomplete. The defendants claimed that the notice did not adequately describe the standard of medical practice, how it was breached, what the defendants should have done, and whether the defendants' actions were the proximate cause of Roberts' injuries. Under MCL 600.2912b, a plaintiff's "notice of intent" must include 1) the factual basis for the claim, 2) the way in which the defendants breached the applicable standard of practice or care, 3) the manner in which the alleged breach was the proximate cause of plaintiff's injuries, 4) the action that plaintiff claims should have been taken to comply with the standard of care, and 5) the names of all health professionals and health facilities the plaintiff is notifying. The trial judge held that the plaintiff's notice did not comply with the "minimum content" requirements of the statute. If the notice fulfilled the statutory requirements, the statute of limitations would have stopped running once the notice was filed, the judge stated. But because the notice was not "filed in compliance with

section 2912b," the statute of limitations ran out and the plaintiff's claim was barred, the judge concluded. Ultimately, the Court of Appeals reversed in a published opinion, holding the plaintiff's notices of intent strictly complied with the statute. The defendants appeal.

PEOPLE v. MCRAE (case no. 121300)
Prosecuting attorney: Mark E. Blumer/517.241.6565
Attorney for defendant John Rodney McRae: Gary L. Roger/313.256.9833
Trial court/judge: Clare County Circuit Court/Hon. Kurt N. Hansen
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Jeffrey Caminsky/313.224.5846
At issue: Did the trial court err in denying a motion to suppress evidence of a conversation between defendant and a policeman who was defendant's former neighbor? The defendant had asserted his rights to silence under the Fifth Amendment and to counsel under the Sixth Amendment. Defendant asked his former neighbor to visit him in jail. The invited visitor questioned defendant about the crime without advising defendant of his rights.
Background: Defendant John Rodney McRae was convicted of first-degree murder in a 1998 jury trial. The victim was 15-year-old Randy Laufer, last seen on September 15, 1987. In 1997, Laufer's bones were found buried on a property that had been McRae's family residence in Michigan before the family moved to Arizona. One of the pieces of evidence linking McRae to the crime was a conversation that McRae had after his arrest with a reserve police officer, Dean Heintzelman, who had been McRae's neighbor before McRae moved from Michigan. According to Heintzelman's testimony, he visited McRae in jail after hearing that McRae had asked why Heintzelman had not visited him. According to Heintzelman, the request came from McRae's wife through Heintzelman's mother. During the visit, Heintzelman was in uniform with a badge. He testified later, "And then I said -- I asked John -- I said, 'John, did you do what you're charged with here?' And he didn't answer me. So we just went talkin' again about, well, more or less about Marty [McRae's son] again. And I said, 'Well, you know, they think Marty had something to do with that, you know, with Randy.' And he says, 'Well, if they try to pin it on Marty, I'll let'em fry my ass.' And that was his words. I said, 'John, did you do it?' And he just hung his head down and said, 'Dean, it was bad. It was bad.' That's -- we didn't discuss it any more." Before the conversation, McRae had invoked his Fifth Amendment right not to answer questions. In addition, he had requested and had received appointment of counsel at arraignment. On appeal, McRae challenged the admission of Heintzelman's testimony. In an unpublished opinion, the Court of Appeals concluded that any error in admission of the testimony was harmless beyond a reasonable doubt. After the Supreme Court remanded to the Court of Appeals, the Court of Appeals again affirmed McRae's conviction, stating that Heintzelman was not acting as a police officer in interrogating defendant, but was acting as a friend and having a conversation. Accordingly, no Miranda warning was required because governmental action was not involved, the Court of Appeals stated. McRae appeals.

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